Dato' KK Sharma v TAF Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-12-231 OF 1995
ABDUL KADIR SULAIMAN J
24 SEPTEMBER 1997

Civil Procedure *— Appeal — Record of appeal — Whether decision appealed from must include duplicate or certified true copy — Whether photocopy of sealed order on the record of appeal is sufficient compliance with requirement of O 49 r 3A(1)(d) — Subordinate Courts Rules 1980 O 49 r 3A(1)(d)*

The appellant appealed against the decision of the sessions judge made after trial. The appellant filed his memorandum of appeal followed by the record of appeal which included, inter alia, a photocopy of the draft decision approved by the solicitors of the respondent. With leave of the court, a supplementary record of appeal was filed incorporating a photocopy of the sealed order of the sessions court. The respondent raised a preliminary issue that the record of appeal, including the supplementary record of appeal, failed to comply with the requirement of O 49 r 3A(1)(d) of the Subordinate Courts Rules 1980 ('the SCR') in that a photocopy of the sealed order of the sessions court is not a copy of the decision within the contemplation of the rule and therefore the appeal ought to be struck out as it was not properly brought.

Held, dismissing the preliminary objection:

(1) A photocopy of a sealed order on the record of appeal is sufficient compliance with the requirement of O 49 r 3A(1)(d) of the SCR unless the sealed copy is a forgery. The word 'copies' appearing in O 49 of the SCR applies to all the documents enumerated therein comprising the record of appeal. If the word 'copies' therein were to be interpreted as meaning duplicate or certified true copies, it would necessarily follow that the relevant pleadings, the notice of appeal and all such documentary exhibits and other documents the parties shall consider relevant for the purposes of the appeal to be included together with the decision, must also be duplicates or certified true copies in order to constitute a valid record of appeal for the purpose of the order. This cannot be so (see p 133F–H); *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd* [1996] 2 AMR 1838 not followed; *Tan Ah Tee & Anor v Paimon bin Kasiran* [1996] 3 AMR 4043 and *Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co* [1996] 3 AMR 3908 distinguished.

(2) Unless O 49 r 3A of the SCR expressly requires otherwise, the word 'copies' therein can include photocopies of the original and in the case of a duplicate of a judgment or order, it may include a photocopy thereof (see p 135C).

[Bahasa Malaysia summary

Perayu merayu terhadap keputusan hakim mahkamah sesyen yang dibuat selepas perbicaraan. Perayu telah memfailkan memorandum rayuannya yang diikuti oleh rekod rayuan yang mana termasuk, antara lainnya, satu salinan fotostat deraf keputusan yang diluluskan oleh peguamcara-peguamcara responden. Dengan kebenaran mahkamah, satu rekod rayuan tambahan telah difailkan menggabungkan satu salinan fotostat perintah mahkamah sesyen yang telah dimeterai. Responden telah membangkitkan satu isu permulaan bahawa rekod rayuan tersebut, termasuk rekod rayuan tambahan, telah gagal untuk mematuhi kehendak A 49 k 3A(1)(d) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') iaitu salinan fotostat perintah mahkamah sesyen tersebut yang telah dimeteraikan bukannya merupakan salinan keputusan dalam lingkungan tanggapan kaedah tersebut dan dengan itu, rayuan tersebut seharusnya dibatalkan kerana ianya tidak dikemukakan menurut aturan.

Diputuskan, menolak bantahan awal:

(1) Satu salinan fotostat perintah yang telah dimeterai pada rekod rayuan adalah merupakan pematuhan yang memadai dengan kehendak A 49 k 3A(1)(d) KMR melainkan jika salinan yang telah dimeterai itu merupakan suatu pemalsuan. Perkataan 'salinan-salinan' yang terdapat pada A 49 KMR tersebut terpakai kepada kesemua dokumen-dokumen yang disebut satu per satu di dalamnya yang mana terdiri daripada rekod rayuan. Jika perkataan 'salinan-salinan' di dalamnya ditafsirkan sebagai bermakna pendua atau salinan yang disahkan benar, ianya perlu dituruti bahawa pliding-pliding yang relevan, notis rayuan dan kesemua ekshibit-ekshibit dokumentar yang sedemikian dan lain-lain dokumen yang akan dianggapkan oleh pihak-pihak tersebut sebagai relevan bagi tujuan rayuan tersebut disertakan bersama-sama dengan keputusan tersebut, mestilah juga termasuk salinan pendua atau salinan-salinan yang diakui benar untuk membentuk satu rekod rayuan yang sah bagi tujuan perintah tersebut. Ini tidak mungkin sedemikian (lihat ms 133F–H); *Teoh Soon Kok t/ a TSK Supplies Trading v MBf Finance Bhd* [1996] 2 AMR 1838 tidak diikut; *Tan Ah Tee & Anor v Paimon bin Kasiran* [1996] 3 AMR 4043 dan *Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co* [1996] 3 AMR 3908 dibeza.

(2) Melainkan A 49 k 3A KMR menghendaki dengan nyata sebaliknya, perkataan 'salinan-salinan' di dalamnya boleh termasuk salinan-salinan fotostat dari yang asal dan dalam kes pendua sesuatu penghakiman atau perintah, ianya mungkin termasuk salinan fotostatnya (lihat ms 135C).]

Notes

For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 865–890.

Cases referred to

Tan Ah Tee & Anor v Paimon bin Kasiran [1996] 3 AMR 4043 (distd)
Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd [1996] 2 AMR 1838 (not folld)
Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co [1996] 3 AMR 3908 (distd)

Legislation referred to

Evidence Act 1950 s 3
Subordinate Courts Rules 1980 O 29 r 11, 11(2), O 49 rr 3A(1)(a), (d), (e), (f), 6(3), 6(3)(d), O 52 rr 4, 4(1)(b)

T Gunaseelan (*Gunaseelan & Associates*) for the appellant.
Barry Goh Meng Yew (*Iza Ng Yeoh & Kit*) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: On 19 September 1995, the appellant filed a notice of appeal against the whole of the decision of the learned sessions court judge made on 8 September 1995. This decision was a decision made after trial. On 26 October 1995, the appellant filed his memorandum of appeal followed by the record of appeal on 22 November 1995. The said record of appeal includes, inter alia, a photocopy of the draft decision approved by the solicitors for the respondent. With the leave of the court, a supplementary record of appeal was filed on 5 June 1996 incorporating a photocopy of the sealed order of the sessions court of 8 September 1995 allowing the claim of the respondent for arrears of rent and dismissing the counterclaim of the appellant with costs, the subject matter of the appeal of the appellant.

The appeal was scheduled for hearing on 28 January 1997. However, the hearing was adjourned to 6 August 1997 pending the decision of the appeal made by the appellant over his adjudication as a bankrupt which decision was scheduled to be delivered on 21 April 1997.

On 6 August 1997 when the present appeal came up for disposal, learned counsel for the appellant again applied for an adjournment, this time on the ground that he had just been served with a notice of a preliminary objection by the respondent on a point of law. The court allowed the adjournment and in the meanwhile the parties had agreed to go by way of written submissions on the preliminary issue that the record of appeal including the supplementary record of appeal failed to comply with the requirement of O 49 r 3A(1)(d) of the Subordinate Courts Rules

1980 ('the SCR') and therefore, the appeal by the appellant ought to be struck out as it was not properly brought. Order 49 r 3A(1) of the SCR states as follows:

> When the appellant who is represented by a solicitor has complied with the requirements of rule 2 of this Order, the appellant shall prepare the requisite number of copies of the appeal record and the record shall contain copies of —
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> (a) the relevant pleadings;
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> (b) the notes of evidence;
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> (c) the grounds of judgment, provided that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal;
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> (d) the decision;
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> (e) the notice of appeal;
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> (f) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal.

It is the contention of learned counsel for the respondent that a photocopy of the sealed order of the sessions court of 8 September 1995 is not the copy of the decision within the contemplation of O 49 r 3A(1)(d) of the SCR. She based her contention on the authority of *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd* [1996] 2 AMR 1838, a decision of the High Court in a similar matter under O 49 r 6(3) of the SCR in respect of appeal from a decision other than a decision made after trial. Mohd Hishamudin J held that the word 'copies' in O 49 r 6(3) in relation to decisions does not refer to mere photostat copies of the decision. It refers to either duplicates of the decision obtained pursuant to O 29 r 11 or alternatively, certified copies of the decision obtained pursuant to O 52 r 4(1)(b) of the SCR. Uncertified photostat copies are not 'copies' for the purpose of r 6(3)(d) of O 49. But in that case cited, the appellant had only enclosed a photocopy of the draft order of the decision and not even a photocopy of the sealed order of the court. The issue before the court then was whether the word 'decision' in O 49 r 6(3)(d) of the SCR includes a draft judgment. At p 1841, his Lordship says this:

> In upholding the objection, I had ruled that a draft judgment is not a 'decision' for the purpose of r 6(3)(d). To my mind, it cannot be the intention of the rule that the appellant may enclose in the appeal record a copy [of] a document which is a manifestation of an unfinished work, of something done halfway. Order 29 of the Subordinate Courts Rules 1980 stipulates in detail what has to be done after a judgment has been made or given by the court. The final step in the prescribed procedure is the extraction of the sealed judgment by the party desirous of enforcing the judgment. A draft judgment is of no use to any party wishing to enforce the judgment. For, since a draft judgment does not bear the seal of the court, it does not have the stamp of authority; it does not have the force of law.

However, in the course of his judgment the learned judge goes on to give his interpretation upon the meaning of the word 'copies' appearing in O 49 r 6(3) in relation to 'decision' in para (d) of sub-r (3) which is in pari materia with O 49 r 3A(1)(d) of the SCR. This is what he says at p 1842:

> Does it mean mere photostat copies of the decision? In the present case, I observe that what had been enclosed in the appeal record are mere photostat copies of the draft judgment. Now, O 29 r 11 provides for the issuance of a duplicate of a judgment to any party to a proceeding who applies for it upon payment of the prescribed fee, and O 52 r 4(1)(b) provides for the issuance of a certified copy of a judgment to any person who applies for it upon payment of the prescribed fee. In my view, 'copies' in relation to decisions does not refer to mere photostat copies of the decision: it refers to either duplicates of the decision obtained pursuant to O 29 r 11 or, alternatively, certified copies of the decision obtained pursuant to O 52 r 4(1)(b). Uncertified photostat copies are not 'copies' for the purpose of sub-r 3(d). This has to be the interpretation to ensure authenticity, particularly bearing in mind that the appeal record is filed, not in the lower court, but in the High Court Registry whereas the original record of the lower court proceedings are with the registry of the lower court.

In the circumstances, his Lordship's dicta concerning photostat copies of the decision for purpose of O 49 r 6(3)(d) of the SCR is obiter for that was not the issue before him. The issue before him was whether a draft judgment is a decision within the meaning of the rule. Now, the matter before this court concerns a photocopy of the sealed order of the sessions court and not a draft order or judgment. While I would agree with the view of the learned judge as to his finding on the issue before him, with respect I cannot agree with his dicta concerning the interpretation of the word 'copies' in relation to 'decision' in para (d) of sub-r 3 of O 49 more so when interpreting the word for purpose of O 49 r 3A(1)(d) of the SCR. Whilst the word should be given the same interpretation in both the provisions, they being in pari materia, it is my view that having a photocopy of a sealed order in the record of appeal is in sufficient compliance with the requirement of O 49 r 3A(1)(d) of the SCR unless the sealed copy is a forgery.

With respect, the word 'copies' appearing in both the relevant provisions of O 49 of the SCR applies to all the documents enumerated therein comprising the record of appeal. If the word 'copies' therein were to be interpreted as meaning the duplicate or certified true copies, it would necessarily follow that the relevant pleadings (O 49 r 3A(1)(a)), the notice of appeal (O 49 r 3A(1)(e)) and all such documentary exhibits and other documents the parties shall consider relevant for the purposes of the appeal (O 49 r 3A(1)(f)) to be included together with the decision (O 49 r 3A(1)(d)) must also be the duplicates or certified true copies in order to constitute a valid record of appeal for purpose of the order. This cannot be so.

Orders 29 and 52 of the SCR mentioned by the learned judge state as follows.

Order 29 r 11:

> (1) Not less than 1 clear day after a judgment or order has been filed a duplicate thereof shall be supplied on payment of the prescribed fee out of the Registry to any party in the proceeding.
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> (2) The duplicate of a jugment or order may be a carbon copy of the original except that if the Registrar so directs, the duplicate of every

judgment or order of such class as he directs, shall be a photographic copy or a copy produced by type lithography or other similar process.

(3) Before a duplicate of a judgment or order is issued it must be sealed and there must be noted thereon the number of the judgment, the date of entry and the amount of any stamp on the original.

(4) Where by any of these rules or any order of the Court the original judgment or order is required to be produced or served it shall be sufficient to produce or serve the duplicate.

(5) A further duplicate of a judgment or order may, on payment of the prescribed fee, be issued if the Registrar is satisfied that the duplicate has been lost and that the applicant for a further duplicate is entitled to it.

(6) A judgment or order shall not be amended except on production of the duplicate thereof last issued, and if the judgment or order is amended the duplicate so issued shall be similarly amended, and the amendment sealed, under the direction of the Registrar.

Order 52 r 4:

(1) Any person shall, on payment of the prescribed fee, be entitled during office hours to search for, inspect and take a copy of any of the following documents filed in the Registry, namely

(a) the copy of any summons or other originating process;

(b) any judgment or order given or made in Court or the copy of any such judgment or order; and

(c) with the leave of the Registrar, any other document.

(2) Nothing in paragraph (1) shall be taken as preventing any party to a cause or matter searching for, inspecting and taking or bespeaking a copy of any affidavit or other document filed in the Registry in that cause or matter or filed therein before the commencement of that cause or matter but made with a view to its commencement.

There is nothing, therefore, in the said two orders that requires the copy of the decision to be a certified copy of it. Order 29 r 11(2) requires that the duplicate of a judgment or order may be a carbon copy of the original or if so directed by the registrar, a photographic copy or a type lithography copy or other similar process thereof. In any event, there would only be a copy of such copy which would be sealed pursuant to sub-r (3). No further duplicate of a judgment or order is to be issued provided the first duplicate is lost. Order 52 r 4 is concerned with copy of document obtained upon a search. It has nothing to do with the copy required to be included in the record of appeal for the purpose of O 49 r 3A or 6 of the SCR. It also does not require that copy to be certified. In any event, the provisions in O 29 r 11 relates to judgment and orders. Consequently, the word 'duplicate' can, if at all, only apply to the word 'decision' under O 49 r 3A(1) but it cannot apply to pleadings and notice of appeal or documentary exhibits and other documents. Therefore, it would be inappropriate to have the word 'copies' in O 49 r 3A(1) which governs paras (a), (b), (c), (d), (e) and (f) thereof to have different meanings attached to it. It will also be observed that under O 29 r 11(3) even the duplicate needs to be sealed and not a mere reproduction by some mechanical means. Clearly, this is

not required in respect of pleadings or notice of appeal or other documents. In any event, O 29 r 11(4) in no uncertain terms states that if the rules require the original to be produced or served it shall be sufficient to produce or serve the duplicate. But O 49 r 3A(1) does not require that to be done. What it requires is merely 'copies' of the documents which include the decision appealed against.

By O 49 r 3A(1), various documents are required for inclusion in the record of appeal. Section 3 of the Evidence Act 1950 defines 'document' to mean any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter, and by the illustration provided in the definition, words printed, lithographed or photographed are documents. Therefore, unless O 49 r 3A of the SCR expressly requires otherwise, the word 'copies' therein can include photocopies of the original and in the case of a duplicate of a judgment or order, it may include a photocopy thereof.

The learned judge in *Teoh Soon Kok* was concerned about the authenticity of the order. With respect, unless it is founded on a forgery, the court should not be concerned with the photocopy of the sealed order being included in the record of appeal pursuant to O 49 of the SCR for the reason that the relevant rule concerns itself only with 'copies' of the decision.

Learned counsel for the respondent cited also *Thye Ye Ind Sdn Bhd v Malaysia Coconut Coir Industrial Co* [1996] 3 AMR 3908 — my own decision when dealing with O 49 r 6(1)(3) of the SCR — and *Tan Ah Tee & Anor v Paimon bin Kasiran* [1996] 3 AMR 4043. The latter case cited concerns an appeal governed by O 49 r 6 of the SCR in respect of decision other than a decision after trial, and in particular it concerns the inclusion of affidavit required by r 6(3)(c) thereof. As it does not concern r 6(3)(d) — the decision appealed from — that case cited is irrelevant for the present purpose. In *Thye Ye Ind Sdn Bhd*, the issue before me concerns an appeal under O 49 r 6(3)(d).

In that case, the record of appeal of the appellant contained, inter alia, only a photocopy of the fair copy of the order of the court appeal from. A preliminary objection was raised that the record of appeal was not in compliance with the rule. *Teoh Soon Kok* was cited in support. Following the decision in that case, I agreed that a fair copy of the order more so its photocopy is not a copy of the decision for the purpose of the rule.

In the circumstances, based on what has been said above, I would dismiss this preliminary objection of the respondent with costs to the appellant as the incorporation of a photocopy of the sealed order of the sessions court by the appellant for the purpose of his record of appeal is in sufficient compliance with O 49 r 3A(1)(d) of the SCR.

Preliminary objection dismissed.

Reported by Eugene Lee